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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-64

ROBERT E. LANNELLI, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

On Certiorari from the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

On May 28, 1974, this court issued a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on May 4, 1973.

OPINIONS BELOW

The opinion of the District Court for the Western District of Pennsylvania is reported at 339 F. Supp. 171 and is reprinted in the Appendix to our petition for certiorari at p. 1a. By inadvertence the oral opinion of the district court, which was never reported and did not purport to be a formal opinion, was omitted from the applicants' petition and the single appendix. It is

printed as a supplemental appendix to petitioners' brief. The opinion of the United States Court of Appeals for the Third Circuit is reported at 477 F.2d 999 and is reprinted in the appendix to our petition for certiorari at p. 23a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1973. A timely petition for rehearing was filed and was denied June 6, 1973. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). A timely petition for certiorari was filed July 5, 1973, and was granted May 28, 1974.

STATUTES INVOLVED

18 U.S.C. 371 provides, in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. 1955 provides, in pertinent part:

§ 1955. Prohibition of illegal gambling business

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to poolselling bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receive gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

QUESTION PRESENTED

Whether petitioners were properly indicated for and convicted of conspiracy to violate 18 U.S.C. 1955 when they were also indicted for and convicted of the substantive violation of 18 U.S.C. 1955.

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of conspiring among themselves and with eleven unindicted coconspirators to conduct an illegal gambling business in violation of 18 U.S.C. 371, and of conducting such business in violation of 18 U.S.C. 1955. (7a) Petitioner Iannelli was also convicted of sending gambling paraphanelia through the mail and mail fraud in violation of 18 U.S.C. 1302 and 1341. Prior to trial the indictment as to one deceased defendant was dismissed. A judgment of acquittal was granted as to four co-defendants at the close of the government's case. (7a) The jury was unable to agree as to one co-defendant and a mistrial was declared as to her. (7a)

On the substantive counts petitioner Iannelli was fined a total of $22,000 and one-eighth of the cost of prosecution and sentenced to concurrent two and three-year terms of imprisonment to be followed by a five-year probation term. Petitioners Diulus, Orlansky, and Scolieri were each fined $15,000 and one-eighth of the cost of prosecution and sentenced to a two-year term of imprisonment to be followed by a three-year probation term. Petitioner Fusaro was fined $10,000 and one-eighth of the cost of prosecution and sentenced to an eighteen-month term of imprisonment, suspended on condition that he spend six months in a jail-type institution to be followed by a three-year probation term. Petitioners Cancilla, Cammarata, and Gobos were each fined $10,000 and one-eighth the cost of prosecution and sentenced to an eighteen-month term of imprisonment, suspended on condition that they spend

three months in a jail-type institution to be followed by a three-year probation term. All of the fines were committed fines. (9a-11a)

On the conspiracy count, each petitioner was sentenced to a five-year probation term to commence after imprisonment and to run concurrently with the other probation term imposed. (9a-11a) The Court of Appeals affirmed. (Pet. App. 23a-27a).

As indicated by the opinion of the district court the case was a complex one and much of the government's evidence was based upon a court-authorized wire-interception. (Pet. App. 1a) The question of the duplicity between the conspiracy count and the substantive count charging violation of 18 U.S.C. 1955 was raised by the defendants in pre-trial motions and a ruling on this question was deferred until the close of the government's case. (Pet. App. 19a, 20a). Although the indictment charged the petitioners with conspiring to violate 18 U.S.C. 1302 and 18 U.S.C. 1952 as well as 18 U.S.C. 1955, the court in its final charge to the jury eliminated the § 1302 and § 1952 violations from the conspiracy count and confined his charge solely to a charge of conspiracy to violate 18 U.S.C. 1955. (55a)

SUMMARY OF ARGUMENT

In 1850 Wharton's Rule was first applied to dismiss a charge of conspiracy to commit adultery. *Shannon* v. *Commonwealth*, 14 Pa. 226 (1850). The reason for the dismissal of the conspiracy charge in *Shannon, supra.*, was, that where the completion of the substantive crime requires a plurality of agents the charge of conspiracy will not lie.

In 1970 the Congress of the United States enacted the *Organized* Crime Control Act of 1970 of which § 1955 was an integral part. The purpose of § 1955 of this statute was to permit federal prosecution and punishment of participants in illegal gambling enterprises involving a minimum of five persons or more (bettors are excluded) which have been in substantially continuous operation for more than thirty days or have grossed more than $2,000 on a single day.

In 1971 the petitioners here were indicted for conspiracy to violate the newly enacted § 1955 of the United States Code and were indicted as well for the substantive violation of the same statute. Since plurality of action is required by the terms of § 1955 the petitioners here and others similarly charged in other jurisdictions raised the issue of the merger of offenses under Wharton's Rule.

It is the contention of the petitioners here that § 1955 requires the concerted action of a minimum of five persons to make the substantive violation a completed federal crime. In order to satisfy the statutory requirements of § 1955 a minimum of five must be intentional participants in an illegal gambling enterprise. If a minimum of five persons wilfully cooperate in such an illegal enterprise they must have done so by means of some agreement however tacit that may have been. Whatever the nature of the agreement of the five or more persons contemplated by § 1955, it is, in essence, a conspiracy. In this case the petitioners have been convicted of and have had imposed upon them additional penalties by reason of their conspiracy convictions. It is precisely this situation that Wharton's Rule was formulated to prevent.

While Wharton's Rule has never actually been applied by this Court it has been cited with approval by it. *Gebardi* v. *United States,* 287 U.S. 112, 122 (1932). The applicability of Wharton's Rule to fact situations such as the instant one has resulted in a conflict in the circuits. The Seventh Circuit, in *United States* v. *Hunter,* 478 F.2d 1019 (1973) has held that Wharton's Rule bars a conviction for conspiracy to violate 18 U.S.C. 1955 when there has also been a conviction of the substantive offense. A similar result was reached in *United States* v. *Whitaker,* 372 F. Supp. 154 (M.D.Pa. 1974). It is our view that these Opinions are the only well-reasoned ones dealing with the subject.

Since under a proper application of Wharton's Rule the offenses merge, it is our connection that it was error to submit the conspiracy count to the jury at all and the error was of such grave dimension that the petitioners here are entitled to a new trial.

ARGUMENT

Since the enactment of 18 U.S.C. in 1970, dual prosecutions for conspiracy to violate § 1955 coupled with the charge of substantively violating the same statute have become increasingly popular with federal prosecutors. With the proliferation of these dual prosecutions defendants faced with such prosecutions have, in increasing numbers questioned the propriety of this practice in a number of our federal jurisdictions. Because there is presently a conflict in the circuits and in vairous district courts, the Solicitor General saw fit not to oppose this petition.

I. The Basic Problem.

Simply stated it is petitioner's contention that the application of Wharton's Rule bars a conviction for conspiracy to violate 18 U.S.C. 1955 when coupled with a conviction for the substantive violation of 18 U.S.C. 1955.

Wharton's Rule provides:

> "When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained."
>
> 2 F. Wharton, Criminal Law § 1604, at 1862 (12th Ed. 1932).

This concept is now new to the law; it was applied as early as 1850 in the case of *Shannon* v. *Commonwealth,* 14 Pa. 226, and has been noted with approval by this court in the case of *Gebardi* v. *United States,* 287 U.S. 112 (1932) where this court stated:

> ". . . where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law . . . or under the federal statute."
>
> 287 U.S. 112, at 122.

In 1943 the Second Circuit commented:

> "If a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it."
>
> *United States* v. *Zeuli,* 137 F.2d 845, 846 (2d. Cir. 1943).

Wharton's Rule has found its most frequent application in cases involving adultery, abortion, incest, and dueling, in which offenses concert of action between two participants is absolutely essential to the commission of the offense. Since dueling has fallen out of fashion and adultery and abortion are now fashionable but seldom prosecuted, the Rule has lain relatively dormant for want of practical application.

II. The Role of Wharton's Rule Today.

As a result of its concern to find more effective methods to deal with organized crime, Congress in 1970 passed the Organized Crime Control Act of 1970, a pertinent portion of which is embodied in 18 U.S.C. 1955 dealing with syndicated gambling. This section of the Act permits federal prosecutions of anyone who "conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business. . ." An illegal gambling business is defined by the statute as one which:

> (i) is a violation of the law of a state or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such a business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

As might be expected the incursion of the federal prosecutorial system into purely intra-state gambling activities gave birth to numerous federal indictments involving hundreds of defendants in the various federal

districts of these United States. As with any new legislative scheme involving criminal sanctions, the passage of 18 U.S.C. 1955 spawned many new legal problems and, as in this case, created new interest in the still viable but slumbering teaching of Wharton's Rule.

In order for a conviction to be sustained under 18 U.S.C. 1955 the government must prove that five or more persons were engaged in the operation of an illegal gambling enterprise. In order to sustain a conviction of conspiracy to violate 18 U.S.C. 1955 the government must prove that two or more persons agreed or conspired to operate an illegal gambling enterprise involving a minimum of five persons. That plurality of agents is necessary to make out the substantive violation of § 1955 or a conspiracy to violate it would seem to be so clear as to be beyond cavil. Thus some courts when faced with the problem of the merger or duplicity of these offenses under Wharton's Rule have properly recognized and applied the rule.

In *United States* v. *Hunter,* 478 F.2d 1019 (7th Cir. 1973) fourteen defendants were indicted in a two count indictment charging conspiracy to violate 18 U.S.C. 1955 and also for substantively violating 18 U.S.C. 1955. Only two stood trial and each was found guilty as to both counts. The Court of Appeals reversed the conspiracy conviction holding inter alia:

> "In the case before us, both alleged offenses require 'the mutual cooperation' or the 'reciprocal action' of a plurality of persons. The conspiracy charged in Count I is confined to the transactions described in Count II as a violation of § 1955; the conspiracy covers nothing more than the substantive crime committed by the conspirators. There

is no suggestion that the proof of intent required for the violation of § 1955 is any different from the evidence required to sustain the charge of conspiracy.

It is true, as the government argues, that the conspiracy charge encompasses more than five persons, the number *required* for a violation of § 1955. It is also true, and equally significant, that the substantive charge encompasses more than two persons, the number *required* for violation of § 371. But an argument which merely emphasizes the number of persons charged in the indictment does not identify an element of each offense which adequately differentiates the other. Two or more may be guilty of conspiracy; five or more may be guilty of either conspiracy or the substantive crime. But even though five or more persons are named in the indictment, a charge of conspiracy to violate § 1955 may not be maintained if it comprehends nothing more than the agreement which those persons necessarily performed by the commission of the substantive offense itself. We think this conclusion is a fair interpretation of congressional intent, is supported by the considerations which normally require that an attempt merge with a completed offense, and is consistent with the general rule that conspiracy is a crime separate from the individual substantive offense or offenses which the conspirators intended. We find 'no ingredient in the conspiracy (charged in Count I) which is not present in the completed crime (charged in Count II).

Pinkerton v. *United States,* 328 U.S. 640, 643, 66 S. Ct. 1180, 1182, 90 L. Ed. 1489."

In *United States* v. *Greenberg,* 384 F. Supp. 1092 (1971), the United States District Court for the Northern District of Ohio, considered the problem of one Anthony Arnone who was charged with the dual

violation of conspiracy to violate 18 U.S.C. 1955 and the substantive violation of the same statute. In a carefully considered analysis of Wharton's Rule as it applied to that case, the court dismissed the conspiracy indictments on pre-trial motions. Approximately one year later the District Court for the Middle District of Florida arrived at a similar conclusion when Judge Krentzman dismissed a conspiracy indictment against eight defendants charged with conspiracy to violate § 1955 as well as the substantive violation of the statute. *United States* v. *Figueredo,* 350 F. Supp. 1031 (1972), reversed, *United States* v. *Vaglica,* 490 F.2d 799 (5th Cir. 1974), petition for certiorari pending *sub nom, Scaglione* v. *United States,* No. 73-1503 October Term, 1973. While Judge Krentzman's decision in *Figueredo, supra.,* may have been denuded of regional authority by its reversal by the subsequent decision of the Court of Appeals for the Fifth Circuit, it has by no means been shorn of the persuasiveness of its logic.

In February of 1974, Judge Muir of the Middle District of Pennsylvania, applied Wharton's Rule and granted judgment of acquittal as to the conspiracy count in a dual conviction of conspiracy and of the substantive offense. Judge Muir found that there was no element in the conspiracy which was not present in the completed crime. *United States* v. *Whitaker,* 372 F. Supp. 154 (M.D. Pa. 1974). In that case five defendants were charged with conspiring to violate § 1955. Since there were only five the court distinguished that case from the instant one and declined to follow the holding of the Third Circuit in this case.

While the aformentioned courts have accorded Wharton's Rule its proper due, a number of others

have not. The Courts of Appeals for the Second, Third, Fourth and Fifth Circuits have held that the conspiracy and substantive counts do not merge in this situation.

The first circuit court to deal with this particular problem was the Second Circuit. In *United States* v. *Becker,* 461 F.2d 230 (2nd Cir. 1972), petition for certiorari pending, No. 72-158, the court held that, because there were seven people in the conspiracy rather than five, Wharton's Rule could not apply. Here the court mistakenly applied what is known as the "third person" exception to Wharton's Rule. The flaws in the *Becker* court's reasoning were lucidly delineated by Judge Krentzman in *Figueredo, supra.,* at p. 1035. The *Becker* decision was also weighed and found wanting by the authors of two recent law review notes. 30 Wash. & Lee L. Rev. 613, 621 (1973); 59 Iowa L. Rev. 452, 463 (1973). In spite of its faulty reasoning, *Becker* became precedent for a number of cases which were to follow.

In the instant case the Third Circuit followed *Becker, supra.,* implicitly and concluded that, since there were more than five defendants, Wharton's Rule could not apply. *United States* v. *Iannelli,* 477 F.2d 999, 1002 (3d. Cir. 1973).

The same problem arose in the Fourth Circuit at or about the same time it arose in the Third. In *United States* v. *Bobo,* 477 F.2d 974 (4th Cir. 1973), petition for certiorari pending *sub nom. Gray* v. *United States,* No. 72-231, the court held that Wharton's Rule was not applicable and of course cited the *Becker* decision. However, although there were eleven indictees in *Bobo,* the court there did not make magic out of mere num-

bers for it went on to inject some new misconceptions into the problem. The court said at p. 987:

> "We are of the opinion that the following elements must co-exist or else the rule may not apply: the immediate effect of the act in view, which is the gist of the substantive offense, reaches only the participants therein; the agreement of the participants is necessary for the completion of the substantive offense; and the conspiracy must be in such close connection with the substantive offense as to be inseparable from it."

It then went on to find that since bettors are involved in gambling the substantive offense reached persons other than the participants; that a gambling business may be operated without the agreement of the five persons required to be involved; and the conspiracy is not in such close connection with the operation of the gambling business as to be inseparable from it.

The introduction of the role of the bettor into this situation is a novel as it is specious. The gist of the substantive offense is the operation of a gambling business by five or more persons, all of whom under the statute are subject to the same penalty. Bettors are not within the statutory scheme at all. The court's conclusion that no agreement is necessary between the five or more who run the gambling business is astonishing. It is difficult to see how the five or more could have the requisite intention to be in the gambling business in the absence of an agreement to be in the business. Gambling businesses do not draft employees into their ranks; they seek only voluntary enlistments and such enlistments are obviously the result of some type of tacit agreement. Equally mystifying is the court's conclusion that the requisite close connection

between the gambling business and the conspiracy is lacking. There is no element in the conspiracy that is not present in the substantive offense. The conspiracy and the gambling business are identical. This identity of elements was the basis of the holdings in *Hunter, supra.*, and *Whitaker, supra.*

In 1974, the Fifth Circuit made its own contribution to the confusion surrounding the problem. In *United States* v. *Pacheco,* 489 F.2d 554 (5th Cir. 1974) the court affirmed dual convictions for conspiracy to violate § 1955 and the substantive offense and refused to apply Wharton's Rule. In that case fifty-eight defendants were indicted on a two count indictment charging conspiracy to violate and the substantive violation of § 1955. It appears that only four of the defendants went to trial and the appeal in the Circuit involved only two. While citing *Becker, supra.*, and its progeny *Iannelli, supra.*, the court in *Pacheco* travelled a different route in order to arrive at a similarly erroneous result.

In *Pacheco* the court found that the requirement of five or more persons was purely jurisdictional and thus concerted action was not required by § 1955. The court said at p. 559:

> "Wharton's Rule is applicable only when more than one party is necessary to perform the basic crime. It prevents prosecution for conspiracy only where the proscribed type of conduct cannot take place without such concert of action. The basic conduct prohibited by section 1955, however—the operation of an illegal gambling business—does not require concert of action."

It is submitted that this conclusion by the court is an attempt to create a distinction without a difference.

While the requirement of five or more persons was included in the act in order to deal with gambling of major proportions, unless five or more intentionally act in the furtherance of a common illegal gambling enterprise, there is no federal crime at all. *United States* v. *Whitaker, supra.* Just as surely as it takes two to tango, it takes a minimum of five to give the government a trot here. The "basic crime" with which we are dealing here is denominated in the title of § 1955 as "Syndicated Gambling" which by its very definition requires the concerted action of more than one person.

The court in *Pacheco, supra.,* does not even advert to the carefully reasoned opinion of its own District Judge Krentzman in the *Figueredo* case. The decision of the Seventh Circuit in *Hunter, supra.,* is dealt with in a footnote which finds that in the *Pacheco* record there is some element of aggravated criminality. What this mysterious element of aggravated criminality is, is not disclosed although it may be that the *Pacheco* panel attached some talismanic quality to the fact that fifty-eight people were indicted in that single indictment.

The *Pacheco* decision was followed in the Fifth Circuit by a per curiam decision in *United States* v. *Vaglica,* 490 F.2d 799, (5th Cir. 1974), which, following the decision in *Pacheco,* reversed three district court decisions among which was *Figueredo, supra.*

As can be seen from the foregoing the modern revival of Wharton's Rule in § 1955 cases has been viewed with something less than unanimous judicial enthusiasm. In spite of this court's admonition that it will "view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecu-

tions.", *Grunewald* v. *United States,* 353 U.S. 391, 404 (1957), four circuit courts and numerous district courts have taken some pains to make two crimes out of one. While this court's teaching in *Callanan* v. *United States,* 364 U.S. 587, 593 (1961) emphasizes that conspiracy is a separate offense from the substantive offense and that the gravamen of conspiracy is an increased danger to society, that element of increased danger would appear to be lacking here.

Congress considered concerted illegal gambling activity by five or more persons a danger to society. The very nature of §1955 requires a conspiracy of a minimum of five; can it be reasonably argued that there is any greater danger to society from a gambling business operated by six or eight? The legislative history of the act clearly discloses that the act is designed to deal "only with illegal gambling activities of major proportions." H.R. Rep. No. 91-1549, U.S. Code Cong. & Admin. News 1970, p 4007. Congress did not provide for penalties in proportion to the size of the operation and thus it would seem to be repugnant to the legislative intent to interpret the statute in such fashion as to permit double punishment for the same offense. 59 Iowa L. Rev. 452, at 466 (1973).

III. The Practical Problem

The dilemma presented by these dual count indictments is both practical and procedural. From the practical point of punishment, the defendant's sentence and fines may be greatly increased. In the instant case seven of the eight defendants received an additional two years of probation. However in *Grosso* v. *United States,* No. 73-1412, petition for certiorari pending, one defendant was given the maximum sentence on

each count to be served consecutively and was fined $10,000 on the conspiracy count and $15,000 on the substantive count and another defendant was given consecutive terms of three years on Count I and five years on Count II and fined $25,000. (Pet. App. 20-22). Thus it can be seen that the problem in terms of punishment is a real one indeed.

As indicated previously § 1955 provides for punishment of all the participants in the proscribed activity. That this punishment should include the punishment for the illegal agreement necessarily included in that activity would appear to be plain common sense. This interpretation would seem to be additionally supported by the application of the "Rule of Lenity," *Bell* v. *United States,* 349 U.S. 81 (1955):

> "This policy of lenity means that the court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."
>
> *Ladner* v. *United States,* 358 U.S. 169, 178 (1958)

It is clear that Congress intended that each participant in an illegal gambling enterprise invoving five or more persons be liable for punishment. Since a conspiracy of five or more is required for the substantive offense, it would seem equally clear that, in the absence of specific legislative intent, the punishment devised by Congress should not be increased by the courts.

The spectre of double punishment is not the only problem with which defendants in this type of dual prosecution are faced. The addition of a conspiracy count places the defendant at a distinct procedural

disadvantage and gives the prosecutor considerable more latitude than he would normally have. This disadvantage has been the subject of discussion by legal commentators and jurists and has been described by one as follows:

> "By means of evidence inadmissable under usual rules the prosecutor can implicate the defendant not only in the conspiracy itself but also in the substantive crimes of his alleged co-conspirators. In a large conspiracy trial the effect produced upon the jury by the introduction of evidence against some defendants may result in conviction for all of them, so that the fate of each may depend not on the merits of his own case but rather on his success in disassociating himself from his co-defendants in the minds of the jury."
>
> *Developments In The Law—Criminal Conspiracy,* 72 Harv. L. Rev. 920, 923 (1959)

See also: *United States* v. *Falcone,* 109 F.2d 579, 581 (2d Cir.), *aff'd.* 311 U.S. 205 (1940); Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants,* 62 Harv. L. Rev. 276, 277 (1948).

The dangers inherent to a defendant in a conspiracy trial are considerably multiplied in cases such as the instant one where the bulk of the evidence is introduced by means of electronic interceptions of telephone communications. Because of the latitude permitted in conspiracy trials conspiracy has been called "the darling of the prosecutor". At the present time a conspiracy charge coupled with evidence produced by electronic surveillance might be more adequately described as the "prosecutor's dream".

In this case the conspiracy count named fourteen conspirators and named eleven unindicted co-conspirators. (15a) Count II of the indictment charged the same fourteen indicted conspirators with a substantive violation of § 1955. The bulk of the evidence introduced by the government consisted of tape recordings of phone calls between conspirators and unindicted co-conspirators and calls between the various named conspirators. This evidence was buttressed by the live testimony of two unindicted co-conspirators who had been granted immunity (William McCullough R. 62 to 100; Joanne Haney R. 1526 to 1594). To put it mildly, this evidence was somewhat incriminating.

At the outset of the case the District Court Judge gave the jury a preliminary charge; this charge began with a discussion and brief explanation of the conspiracy count and continued on through the successive counts of the indictment. (23a-32a) In connection with his preliminary conspiracy charge the court said:

> "In determining whether a conspiracy existed, you should consider the actions and declarations of all of the alleged paticipants. However in determining whether a particular defendant was a member of the conspiracy, if any, you should consider only his actions or statements. He cannot be bound by the actions or declarations of other participants until it is established a conspiracy existed and he was one of its members. This, I think will become clear, too, so we go along." (25a-26a)

The trial went along for a month and whether the court's cautious note of optimism, that this concept would become clear at some later point was justified, is a matter of some doubt.

In the court's final charge to the jury, the trial judge reviewed the counts of the indictment in reverse order. Starting with count 6 and proceeding through count 1, he also suggested that the jury deliberate in the same fashion. Whether the court's suggestion in this regard was followed is, of course, not known. The following portion of the final charge places in clear focus the evidentiary procedural problem posed by this type of dual prosecution:

> "If you once determine, however, after reviewing the evidence that conspiracy exists, and that the defendants or the defendant whom you happen to be considering at the time were members of it, then as to those who you find were members of the conspiracy, you may consider the declarations of others who were also members as evidence to aid you in determining if there is guilt proved beyond a reasonable doubt.
>
> Remember, for this situation to apply, you must determine one, a conspiracy existed; two, that the particular defendant whose guilt you are considering was a member, and then you may consider the hearsay statements made during the course of the conspiracy in furtherance of the conspiracy by another member of the conspiracy.
>
> Now, this is why I start off with the other counts and work toward the first count. That evidence would not be admissable in proving guilt under the second count, but it could be admissable under the circumstances I just enumerated with you in proving the guilt of conspiracy." (61a)

Regardless of what order the jury considered the counts of the indictment they found each and every defendant guilty of conspiracy as well as guilty of a violation of the substantive count. It would appear,

therefore, that they considered the acts and declarations of each as incriminating all and therein lies the principal danger of the conspiracy count being engrafted onto the indictment for the substantive offense. In the absence of the conspiracy count, as clearly recognized by the trial court, the jury could only consider evidence disclosed by a telephone call between one unindicted co-conspirator and a defendant as evidence against that defendant alone. With the addition of the conspiracy concept the implication and conviction of everyone is made immeasurably simpler.

A dramatic example of the problem presented in this situation is found in *Grosso* v. *United States,* No. 73-1412, certiorari pending, where four persons were indicted for conspiracy to violate § 1955 and the substantive violation of the statute. In the trial of that case the government introduced, at the very outset of the trial, a judicial admission in the nature of a confession by the principal co-defendant, and, in spite of the seemingly patent *Bruton* problem involved, the evidence was received, over strenuous objection by counsel, under the convenient umbrella of the conspiracy theory. (No. 73-1412, Grosso R. 290-314).

In this case the admission of the testimony of co-conspirators was the subject of continuing objection and resulted in considerable colloquy as might be expected when numerous defendants are involved and a considerable number of counsel answer the call to battle in legitimate and concerned support for the individual interest of their clients. The technical objections raised by counsel in this type of case is not born out of the time-worn tradition of legal nit-picking but is prompted by the necessary practical view that

experience in conspiracy trials has taught experienced counsel that once a conspiracy count rears its ugly head in a trial, what any witness says in the trial may convict every defendant.

It is our contention that the application of Wharton's Rule at the very least bars a punishment for conspiracy to violate § 1955 coupled with a separate punishment for the substantive offense. If we are correct in that contention, the question then arise as to the justification for submitting the conspiracy charge to the jury at all.

The government will doubtlessly contend here, as they have in cases in the lower courts, that the addition of a conspiracy count is justified on the hypothetical basis that a conspiracy to violate § 1955 can exist and should be punishable even if the substantive offense had not been completed. The trial judge in this case attempted to hypothesize such a situation to the jury in his final charge. (60a) This type of conjecture is about as relevant as the ancient theological debates relating to the number of angels that could dance on the head of a pin. There has never been a federal prosecution for conspiracy to violate § 1955 which was not coupled with a prosecution for the violation of the substantive offense. The statute requires as a *sine qua non* to successful prosecution that a minimum of five or more persons engage in an illegal gambling enterprise which has actually operated for thirty days or more or has grossed more than $2,000 in a single day. This case as well as all others that have been prosecuted under the legislative aegis of § 1955 are real cases not hypothetical ones. For whatever fanciful hypothetical potential conspiracies the government may

envision in aid of argument, the petitioners here have been convicted and sentenced for two separate crimes which are legally and logically one.

If conspiracy to violate § 1955 is not a separate crime and separately punishable, there is no justification for submitting it to the jury. If the prosecution cannot properly attain additional punishment, it should clearly not be permitted to take advantage of the increased evidentiary latitude afforded by traditional conspiracy concepts reinforced by the court's charge to the jury. If, in point of law, the petitioners here were not legally liable for additional punishment for the illegal agreement of which they were found guilty in the substantive offense, they then have been convicted by a jury which has been instructed in so fundamentally faulty a manner as to require a new trial.

The trial judge attempted in his charge to suggest to the jury that they consider the substantive offense before they deliberated on the conspiracy count; this was a mere suggestion, not a direction. (41a) No matter what order the deliberation of the jury took in terms of the individual counts, they had been instructed that hearsay evidence by any witness could be evidence of guilt of all the petitioners as to conspiracy—a conspiracy of which they had to find petitioners guilty in the substantive offense. It is respectfully submitted that the charge of the court on this point cannot now be cured by the simple expediency of a reversal of the conspiracy conviction and the remission of the sentence that the court imposed as a result thereof, and, accordingly, a new trial should be granted.

CONCLUSION

Petitioners here, eight in number, have been convicted and sentenced for violation of conducting an illegal gambling enterprise in violation of 18 U.S.C. 1955. Petitioners here, the same eight individuals, have been convicted and have had additional sentences imposed upon them for conspiring to violate 18 U.S.C. 1955.

It is the contention of the petitioners that a proper statutory interpretation of 18 U.S.C. 1955 requires a finding by this court that petitioners should not have been convicted an dsentenced for the conspiracy to violate § 1955 and the substantive violation thereof. We bottom this contention on the precept of Wharton's Rule, which in the recent past has been not much in vogue, but, like most older teachings, is today still very viable. The substantive offense in this case requires the concerted action of a plurality of agents to make the crime complete and so does the conspiracy statute. The elements requisite to complete both offenses are identical and thus we contend that the offenses merge.

Since the offense charged in the conspiracy count and in the substantive count were one and the same, we respectfully contend that the petitioners are entitled to a new trial by reason of the fact that the court's final charge permitted the jury to consider the guilt of the defendants by evidentiary standards which were fundamentally erroneous and incurably prejudicial. At the very least we contend that petitioners are entitled to a reversal of their conspiracy convictions and vacation of the sentences imposed thereunder.

For all of the foregoing reasons, the judgment below should be reversed and a new trial granted.

Respectfully submitted,

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